

ESTATE OF JOSEPH RED EAGLE

IBIA 73-1

Decided July 30, 1973

Appeal from the Judge's decision denying the validity of Last Will and Testament leaving decedent's entire estate to the appellant.

Reversed and remanded.

Indian Probate: Administrative Procedure: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian probate proceedings.

Indian Probate: Administrative Procedure: Official Notice, Record

Official notice of documents and records will not be taken unless they are introduced in evidence or unless an order or stipulation provides to the contrary.

Indian Probate: Rehearing: Generally

A rehearing will be granted where the original hearing did not conform with the standards of a full opportunity to be heard embodied in the Administrative Procedure Act (5 U.S.C. §§ 554 and 556 (1970)).

APPEARANCES: Walter B. Dauber, Esq., of Tonkoff, Dauber & Shaw, for appellant; Joseph A. Esposito, Esq., of Dellwo, Rudolf & Grant, for appellee.

OPINION BY MESSRS. McKEE AND SABAGH

The probate of the estate of Joseph Red Eagle, an unenrolled and unallotted Osage Indian of the State of Oklahoma, was the subject of a hearing, held on September 3, 1971. The Administrative

Law Judge, Indian Probate, denied the validity of a purported last will and testament dated August 21, 1957, leaving decedent's entire estate to Hobart B. Bowlby, a non-Indian, because of the legal incompetency of the decedent and because the relationship of the devisee to the decedent was of such a confidential and fiduciary nature as to raise a presumption of undue influence, which was not sufficiently rebutted. Consequently, the Judge ordered that a previous will dated September 2, 1952, be approved as a "self-proved" will leaving the entire trust estate to Felix A. Aripa, "nephew" of the decedent.

A petition for rehearing was denied on June 1, 1972, and Hobart Bowlby appealed on July 11, 1972, for the following reasons:

- 1) Erroneous findings that Joseph Red Eagle was incompetent prior to and at the date of the Last Will and Testament dated August 21, 1957;
- 2) The finding that the relationship of Hobart Bowlby to Joseph Red Eagle was of a confidential and fiduciary nature so as to raise a presumption of undue influence;
- 3) Placing the burden upon Hobart Bowlby to produce evidence that the will represented the uncontrolled acts of the testator;

On the basis of the record we are unable to determine if appellant's contentions are correct.

In this case there appears to have been a complete breakdown in administrative due process. A hearing was held on September 3,

1971. The appellant, Hobart B. Bowlby, appeared in person and by counsel being fully aware of the existence of the will dated August 21, 1957 wherein he was named as sole devisee. Felix Aripa appeared without counsel, and apparently both parties were completely unaware of the existence of the will dated September 2, 1952 wherein Felix Aripa was named as sole devisee. The only two witnesses who appeared and were examined were the will devisees. The examination was conducted solely by the Judge who concluded the hearing with:

This matter will be continued to Portland without notice for further information and hearing. (Tr. 32.)

During the hearing the examination of Mr. Bowlby touched briefly upon his appointment as guardian of the testator, but there was no mention made of a pre-existing indebtedness to Mr. Bowlby or a number of other matters which are enumerated by the Judge in his Memorandum Opinion and his Order On Wills issued March 10, 1972. In addition to the transcript of the September 3, 1971 hearing, the record now includes: copies of certain testimony received in the probate of the Estate of Mary Magdeline Davenport Red Eagle; a great number of documents purportedly pertaining to the guardianship proceedings conducted over the years by Mr. Bowlby as guardian for the testator; and certain documents from the Bureau of Indian Affairs pertaining to the testator's income and management of his trust funds during the guardianship. No further hearing had been

held, and there was no indication that the documents in question have ever been presented to or considered by either of the interested parties or their counsel. No single one of these documents was marked for identification at any hearing or admitted in evidence. See Estate of Julius Benter, 1 IBIA 59 (January 12, 1971) and in Estate of Greybull, IA-D-2 (September 7, 1966).

The will dated September 2, 1952, was approved without supporting testimony. Attached to the will are three affidavits, one by the testator, a joint affidavit of the two will witnesses and the affidavit of the scrivener all dated the same day as the will. The Judge makes no finding of the adequacy of the affidavits or other facts which would bring the will within the provisions of 43 CFR 4.233(a). This section contains the following provision:

If uncontested, a self-proved will may be approved and distribution ordered thereunder with or without the, testimony of any attesting witnesses.
(Emphasis supplied)

The Judge ruled by inference that the existence of a later will, i.e., the will dated August 21, 1957, does not constitute a contest against the earlier 1952 will. We cannot ignore the fact that there are two contending proponents of separate wills which is an inappropriate situation for the application of the permissive portion of the regulation. Nothing in the record suggests that the will witnesses or others are unavailable.

Moreover, the record does suggest that if both wills were to be disapproved, a possibility may exist that the estate will escheat to the tribe under 25 U.S.C. § 373a (1970). It is conceivable that the tribe may be a party in interest entitled to notice of further proceedings.

A rehearing should have been granted in any event to complete the record, and to examine in depth, far beyond the extent of the examination conducted on September 3, 1971, as to the actual circumstances surrounding the execution of the wills and the testamentary capacity etc. of the testator at the time each will was executed.

The Judge made no findings of fact, as such. This proceeding is for the "determination of adjudicatory facts" as they are defined and discussed in Wood County Bank v. Camp, 348 F. Supp. 1321 (D.C. D.C. 1972). In that case the Comptroller of Currency issued an order in which there were no findings of fact, and the case was remanded to him by the court for further proceedings including the issuance of an order which would conform to the requirement set forth by Mr. Justice Cardozo in United States v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 294 U.S. 499, 511 (1935).

* * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

This Board took a like view in the Estate of Lucille Mathilda Callous Leg Ireland,

78 I.D. 66 (1971), issued prior to Wood County Bank, supra, where we said:

Findings of fact and conclusions of law should be clearly and succinctly incorporated in every examiner's decision in order to show the factual and legal support for the result reached. Our regulation, 25 CFR 15.15, not only requires this, but it was held in Estate of Charles White, 70 I.D. 102, that Indian probate adjudications fall within the provisions of the Administrative Procedure Act. The pertinent part of that act, 5 U.S.C.A. sec. 557, provides:

(c) * * * All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -- (A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction relief, or denial thereof.

There is no indication in the record that any investigation had been made concerning the testator's possible ownership of inherited restricted interests in Osage land in Oklahoma, or of his possible inherited interests in an Osage head-right or a fractional part thereof. If it is established that the testator was of Osage blood, but unenrolled, then the interests which he owned on the Coeur d'Alene Reservation and any head-right interest which he might have shall be regarded as trust property over which the Judge has probate jurisdiction in this estate.

On the basis of the record before us the finding that Felix A. Aripa and Lucy Sanchez are the decedent's nephew and niece and the conclusion that they are heirs at law are both patently in error. The Judge said in his decision, "Decedent * * * died * * * on the 29th day of August 1969 * * * leaving surviving certain heirs at law Felix Aripa, nephew, Lucy Sanchez, niece * * * entitled to a one-half of the estate each." However the transcript refutes that relationship attributed to the parties.

Q. Mr. Aripa, you were, were you not, the nephew of Joseph Red Eagle's wife Magdeline Davenport Red Eagle?

A. Correct.

(Tr. 1)

* * * * *

Q. * * * What relationship did you bear to Mrs. Red Eagle?

A. Well, she'd be my aunt, that is my father's youngest sister.

(Tr. 2)

* * * * *

Q. Your father was the brother of . . .

A. Mary Magdeline.

Q. What was your father's name?

A. Stanislaus.

(Tr. 9)

* * * * *

Q. Do you have any brothers and sisters?

A. Yes, I have a sister Lucy, Lucy Sanchez.

* * * * *

Q. Mary and your father were brother and sister?

A. Yes, they are, yes.

(Tr. 10)

Under the laws of descent in force in the State of Idaho at the decedent's death on August 29, 1969, Felix Aripa and Lucy Sanchez could not be heirs of the decedent as they were not of his blood. They were related to him by marriage only.

We find that the record is incomplete, and that a proper determination cannot be made on the evidence before us.

Therefore, we remand this case to the Administrative Law Judge for a hearing de novo, which shall include inter alia, proper notification of all interested parties, a transcript incorporating all relevant testimony and documentary evidence admitted at the hearing and a decision including therein, findings of fact and conclusions of law. See 5 U.S.C. § 557(a)(3) (1970).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Order Denying the Petition for Rehearing and REMAND the matter to the Administrative Law Judge for hearing de

novo to determine heirs, to approve or disapprove wills and to determine creditors rights, if any.

David J. McKee, Chairman

Mitchell J. Sabagh, Member